

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ROBERT LEE POOLE	§	
VS.	§	CIVIL ACTION NO. 1:05cv857
UNITED STATES OF AMERICA	§	

MEMORANDUM ORDER OVERRULING MOVANT'S OBJECTIONS AND ADOPTING
THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Movant Robert Lee Poole, an inmate at the United States Penitentiary in Atwater, California, proceeding *pro se*, brought this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

The court referred this matter to the Honorable Keith F. Giblin, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The magistrate judge issued a report recommending that the above-styled motion be dismissed. The recommendation was based on the magistrate judge's determination that this motion is a second or successive motion to vacate sentence and movant had not received permission from the Fifth Circuit Court of Appeals in order to file the motion.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such order, along with the record, pleadings and all available evidence. Movant filed objections to the magistrate judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b). After careful consideration, the court concludes movant's objections are without merit.

Movant asserts in his objections that his motion to vacate was actually filed pursuant to Rule 60(b), contesting procedural violations that occurred in his original § 2255 motion. However, movant's motion is clearly an attempt to vacate his conviction. Thus, the motion was properly treated as a § 2255 motion to vacate, set aside or correct sentence. Further, movant is not permitted to use Rule 60(b) as a substitute for failure to timely file an appeal. *See Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002).

ORDER

Accordingly, movant's objections are **OVERRULED**. The findings of fact and conclusions of law of the magistrate judge are correct and the report of the magistrate judge is **ADOPTED**. A final judgment will be entered in this case in accordance with the magistrate judge's recommendation.

So **ORDERED** and **SIGNED** this **31** day of **October, 2006**.

A handwritten signature in black ink, appearing to read "Ron Clark", is written above a horizontal line.

Ron Clark, United States District Judge